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In the Supreme Court of the United States

OCTOBER TERM, 1967

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

v.

LOCAL UNION NO. 125, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SIXTH CIRCUITS

BRIEF FOR THE SECRETARY OF LABOR

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OCTOBER TERM, 1967

No. 57

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

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No. 58

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OPINIONS BELOW

In No. 57, the opinion of the court of appeals (57 R. 65) is reported at 372 F. 2d 86, and the opinion and judgment of the district court (57 R. 38) is reported at 244 F. Supp. 745. The order of the district court on the Secretary's motion for post-judgment relief (57 R. 55) is unreported.

In No. 58, the order of the court of appeals (58 R. 112) is reported at 375 F. 2d 921; the opinion of the

district court striking portions of the complaint (58 R. 5) is reported at 231 F. Supp. 590; and the opinion of the district court on the Secretary's motion for summary judgment (58 R. 92) is unreported.

JURISDICTION

In No. 57 the judgment of the court of appeals (57 R. 70) was entered on December 16, 1966. In No. 58, the judgment of the court of appeals (58 R. 112) was entered on December 15, 1966. The petitions for writs of certiorari were filed on March 3, 1967, and granted on May 15, 1967 (57 R. 72; 58 R. 114). We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Title IV of the Labor-Management Reporting and Disclosure Act of 1959 establishes standards for union elections. The Secretary of Labor, upon the complaint of a union member who has failed to obtain within three months redress through the internal processes of the union, is authorized to bring suit. If the court finds that a violation of the Act has occurred which may have affected the outcome of an election, it is directed to declare the election void and to order a new election under the Secretary's supervision. We present the following questions relating to this statutory scheme:

1. Whether the Secretary's suit is mooted if, during its pendency, the union holds another election.

2. Whether the Secretary may challenge only the precise violations specified in the member's complaint to the union (No. 58).

3. Whether an unreasonable candidacy qualification may have affected the election's outcome when it rendered more than 97 percent of the union membership ineligible for elective office, including a member who had actually been nominated (No. 57).

STATUTE INVOLVED

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, are printed in the Appendix, *infra*, pp. 55–62.

STATEMENT

1. *No. 57.*—The Secretary of Labor, on March 31, 1964, filed suit asking the district court to set aside an election which had been conducted by the defendant union on October 18, 1963, and to direct the holding of a new election, to be supervised by the Secretary. The action was instituted pursuant to Section 402 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 482), which authorizes the Secretary of Labor to bring suit in respect of a violation of Section 401 of the Act after receiving a complaint from a union member who has exhausted his internal union remedies, and directs the district court to grant the relief prayed for if it finds that such a violation may have affected the outcome of an election. The complaint alleged that the union had violated Section 401(e) of the Act, which provides that in an election subject to the Act every member of a labor organization shall "be eligible to be a candidate and to hold office (subject to * * * reasonable qualifications uniformly imposed) * * *."

It was stipulated that respondent, Local 153, is a

local labor organization chartered by, and subordinate to, the Glass Bottle Blowers Association of the United States and Canada, AFL–CIO, is engaged in an industry affecting commerce as defined by the Act, and is therefore subject to the requirements of Title IV; that the International Constitution and the local's by-laws require all candidates for local union office to have attended 75 percent of the monthly union meetings in the two years prior to the election; that members were not excused on account of illness but only if they were required to be at work when the union meetings were held; and that excuses had to be submitted in writing to the union's secretary within 72 hours of the missed meeting (57 R. 10–13). As a consequence of these requirements, it was stipulated, only 11 members of the 500-member union were eligible to run for office in 1963 (57 R. 12). In the election the Vice-President and Financial Secretary ran for reelection unopposed (57 R. 17) and there were no candidates at all for Recording Secretary and for three Trustee positions; these positions were filled by the appointment of members who could not have qualified as candidates under the meeting-attendance requirement (57 R. 12).

This action was instituted after the Secretary had received and investigated a complaint from a union member, a nominee for the office of president of the local, who was disqualified as a candidate because he had attended only 17 of the 24 relevant monthly meetings (57 R. 13). The minutes of one of the seven meetings which he missed indicated that he had been hospitalized on the occasion of that meeting (57 R.

13). The union had failed to act on the member's internal complaint (57 R. 11–12).

The district court held that the 75-percent attendance requirement violated the "reasonable qualifications" provision of Section 401(e) because 75 percent was too high a percentage, the provision governing excuses was too limited and the effect of the rule too restrictive (57 R. 44–46). Notwithstanding this conclusion, the court denied the relief requested by the Secretary on the ground that the plaintiff had failed to establish that the violation "may have affected the outcome" of the election, as required by Section 402(c)(2), because there was evidence that the complaining member "voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency, and thus his failure to qualify was not due to the existence of the unreasonable requirements of the By-Laws but to his own voluntary unwillingness to comply therewith" (57 R. 47). It therefore dismissed the complaint, although it "retain[ed] jurisdiction" for further action "in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the next regularly ensuing election of officers of defendant union" (57 R. 48). The Secretary appealed from the judgment of dismissal.

The union's next regular election was held in October 1965, and on the Secretary's motion the court of appeals remanded the case to the district court to take evidence concerning that election (57 R. 49). The

Secretary submitted an affidavit stating that the 75-percent attendance requirement had remained in effect during the 1965 election; that in consequence only 2.6 percent of the membership had been eligible to run for office; that only eight candidates ran for the eight union offices, with only one running for president and no candidates being nominated for three of the offices; that no members were nominated who were ineligible under the 75-percent rule; and that the rule was not waived on behalf of any nominee (57 R. 52–54). The district court denied the Secretary's motion to have the 1965 election declared invalid (57 R. 55).

On appeal by the Secretary, the court of appeals held that the Secretary's challenge to the 1963 election had been mooted by the 1965 election. The court relied on the decision of the Court of Appeals for the Second Circuit in *Wirtz* v. *Local Unions 410, 410A, 410B & 410C, International Union of Operating Engineers,* 366 F. 2d 438, and in particular on the following reasoning of the Second Circuit (366 F. 2d at 442):

> The exclusive remedy which Congress had created for challenging a union election, see 29 U.S.C. § 483, is a suit by the Secretary to declare the election void and to direct the conduct of a new election. * * *
>
> * * * It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare

> a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election * * * we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot.

The court found it unnecessary to decide whether the trial court had been correct in ruling that the imposition of the unreasonable meeting-attendance qualification could not have affected the outcome of the 1963 election, but stated that it would not permit the decision to stand as a precedent on this contested issue and, therefore, directed that both the judgment and the post-judgment order be vacated (57 R. 69).

2. *No. 58.*—Respondent, a local union engaged in an industry affecting commerce as defined by the Labor-Management Reporting and Disclosure Act and therefore subject to the requirements of Title IV, held a general election of officers on June 8, 1963. The vote for the office of Business Representative was a tie. A run-off election for that post was held on July 13, 1963 (58 R. 92). Within one month after the run-off, the losing candidate in the run-off protested its conduct to the union, on the ground that members not in good standing had been permitted to vote, in violation of Section 401(e). He then filed a complaint with the Secretary of Labor repeating his protest (58 R. 92).

Respondent is governed by the Constitution and the Uniform Local Union Constitution of the Laborers' International Union of North America. Under the Uniform Local Union Constitution, membership dues

are payable on the first day of each month; unless they are paid on or before the last day of the following month, good standing is lost, and the member is automatically suspended without notice and with loss of all membership rights except the right to readmission upon payment of a fee (58 R. 37, 95). Readmitted members are considered new members from the date of readmission (*ibid.*). Candidates for office are required to have maintained continuous membership in good standing for a period of two years in the International and at least one year in the Local (58 R. 34, 107). Since any member whose dues are in arrears for more than two months is automatically suspended, such arrearage occurring within two years before the election makes a member ineligible to be a candidate.

The International Constitution requires respondent to remit to the International a per capita tax payment of $1.00 per member each month (58 R. 30, 96). These payments are to be made only for members who have in fact made current payment of their dues to the Local (58 R. 39, 98). However, during the calendar year 1962 and until July 1963, respondent's Secretary-Treasurer at times remitted per capita tax payments to the International from the general fund of the Local in behalf of individual members who had not made timely payment of their dues (58 R. 96–98). As a result, some 50 to 75 members appeared to be in good standing, on the basis of the per capita tax reports, although they had actually lost their good standing (58 R. 63, 96). During the same period, some 700 members who had fallen into arrears

in the payment of their dues were automatically suspended with loss of good standing in accordance with the Constitution (58 R. 101). The Secretary's investigation disclosed that 16 of the 27 candidates for office in the June 8, 1963, election, including several victorious candidates (among them the eventual winner of the run-off election) should have been ruled ineligible under the foregoing provisions and that approximately 50 of the members voting in the June 8, 1963, election, and approximately 60 members voting in the July 13 run-off election, should have been declared ineligible (58 R. 75–76).

By a letter dated January 27, 1964, the International and respondent Local were advised of these findings (58 R. 68). A conference between attorneys representing the Secretary and attorneys representing the International was held on February 4, 1964, to discuss the investigative findings (58 R. 75–76). When the representatives of the International declined to take any corrective action, the Secretary, on February 7, 1964, brought suit to declare both the general and run-off elections invalid and to direct a new election of officers under his supervision. The complaint alleged that the union had violated the Act by permitting ineligible members to vote and to run for office at both the general and run-off elections in 1963 (58 R. 3).

On the union's motion, the district court struck those portions of the complaint directed to the election of officers other than Business Representative because no complaint by a union member had challenged the general election of June 1963 (58 R. 15).

The Secretary later moved for summary judgment with respect to the remaining allegations of the complaint. The court, finding that at least 58 of the 379 members who voted in the run-off election of July 13, 1963, and two of the three candidates in that run-off election, had been ineligible under the union's constitution, granted the Secretary's motion and directed the conduct of a new election for the office of Business Representative under the Secretary's supervision (58 R. 107). Referring to its earlier ruling dismissing parts of the Secretary's complaint, the court found it unnecessary to decide whether the Secretary was entitled to challenge the run-off election on the basis of the ineligibility of two of the three candidates. Because of the imminence of respondent's next regular election, the court directed that the regular election for the office of Business Representative be held under the supervision of the Secretary and the successful candidate installed in office for a full constitutional term (58 R. 110).

The Secretary appealed from the order limiting relief to the office of Business Representative. On June 11, 1966, less than two months after the district court had rendered judgment, the union held its next regular election and, at the same time, a supervised election for the office of Business Representative pursuant to the court's order. The court of appeals, without reaching any other issues, thereupon dismissed the Secretary's appeal as moot, relying on the decision of the Court of Appeals for the Second Circuit in *Wirtz* v. *Local Unions 410, 410A, 410B &*

410C, International Union of Operating Engineers, supra.

SUMMARY OF ARGUMENT

Title IV of the Labor-Management Reporting and Disclosure Act of 1959 establishes certain standards for the conduct of union elections. The procedure for redressing violations of these requirements is as follows. First, a union member must complain to the union of an electoral violation. Should the union fail to make voluntary correction, the Secretary of Labor may bring an action in a federal district court. The court shall declare the election challenged by the Secretary void, and direct the holding of a new election under the Secretary's supervision, if it finds that a violation of Title IV occurred which may have affected the outcome of the election.

I

In each of the two cases at bar, the union held its next regularly scheduled election while the Secretary's appeal from an adverse decision of the district court was pending, whereupon the court of appeals dismissed the case as moot because, in its view, the Secretary was no longer entitled to an order directing a new election under his supervision. However, the provision requiring a supervised election upon finding a violation that may have affected the outcome of the challenged election is unqualified; the statute does not say, "unless the union has already held its next election," although it could have been anticipated that a second election would frequently overtake the Secretary's suit. Moreover, to imply such a limitation on

the scope of the relief available to the Secretary would defeat the basic policy of Title IV.

Briefly, that policy is to foster union democracy and representative union leadership. These goals would be thwarted if the holding of an unsupervised election terminated judicial power to order a supervised election. In the first place, there is no assurance that the union in the second election will abandon the violation that gave rise to the Secretary's challenge to the first. Where it does not—as happened in one of the cases at bar, No. 57—the result is that the violation will go entirely uncorrected unless a supervised election is ordered, since Congress gave the courts no power to enjoin violations of Title IV. In the second place, incumbent officers enjoy inherent advantages in obtaining re-election in an unsupervised election because they control the electoral machinery. Thus, if they were unlawfully elected, a supervised election (the procedures for which are specifically designed to minimize the advantages of the incumbents) is necessary in order to assure that the effects of the illegality do not persist.

To be sure, the result will sometimes be the nullification of an election that was not itself unlawful. But it is not uncommon for a judicial remedy to outlaw some lawful as well as unlawful acts where necessary to ensure complete and effective relief against a proven illegality. This result is far preferable to either enjoining the holding of another election pending the Secretary's suit attacking the first—which serves only to perpetuate the unlawfully elected incumbents in office beyond the expiration of their

term—or expediting the Secretary's suit—a device that will often be ineffective, due to the frequency of union elections, and sometimes positively harmful in its impact on the statutory policy and procedures of voluntary settlement of electoral violations.

II

In No. 58, the district court held that the Secretary of Labor could not challenge a general election for all officers because the complaining union member had specifically challenged only the conduct of the run-off election for the one office as to which the general election resulted in a tie vote. We believe that the Secretary was entitled to broaden the scope of the suit as he did. The Secretary's allegations were fairly within the scope of the internal complaint, which, limited as it was, placed the union on clear notice of the violations that had occurred at the general election. For any reasonably careful investigation of the run-off would have revealed that the same violation had occurred at the general election and had extended to all of the offices at stake.

Beyond this, we submit that the Secretary is entitled to challenge any violations that he has uncovered in the course of his investigation of the union member's complaint. The statutory language imposes no restriction on the scope of the complaint (save that it must relate to the election challenged by the complaining member, and for this purpose it seems plain that the run-off and the general election which preceded it should be viewed as a single election). The statutory goal of representative union leadership would be

undermined if the Secretary could not proceed against violations that his investigation of the internal complaint revealed merely because they were concealed from, or overlooked by, the complainant. Nor is the policy underlying the internal-complaint-and-exhaustion requirement—to afford the union an opportunity to correct any electoral violations voluntarily before the Secretary brings suit—offended by the principle we urge, since the Secretary notifies the union, in advance of suit, of any violation he discovers in the course of his investigation (whether or not they were alleged in the internal complaint), thus affording full opportunity for voluntary correction.

III

The district court in No. 57 held that a requirement that union members to be eligible to stand for office have attended 75 percent of the union's monthly meetings in the two years preceding the election was unreasonable and hence unlawful under Title IV, but refused to find that it "may have affected the outcome" of the election—the necessary predicate for relief. This was error. The purpose of requiring a showing that the violation may have affected the outcome of the election is to excuse trivial violations; but that, plainly, is not our situation. Here the unlawful practice resulted in disqualifying 97 percent of the union's membership from running in the union's elections. Nor can it be said that none of those wrongfully disqualified might have stood for office and won—thus affecting the outcome—especially when one of the disqualified members was an avowed candidate for a specific union office.

ARGUMENT

I. IN BOTH CASES, THE COURTS OF APPEALS ERRED IN HOLDING THAT AN ACTION BY THE SECRETARY OF LABOR TO DECLARE AN ELECTION VOID AND TO DIRECT A NEW ELECTION UNDER HIS SUPERVISION WAS MOOTED BY THE INTERVENTION OF THE UNION'S NEXT REGULARLY SCHEDULED ELECTION

Section 401 of the Labor-Management Reporting and Disclosure Act of 1959 declares unlawful certain abuses in union elections, such as imposing unreasonable candidacy requirements, and Section 402 empowers the Secretary of Labor, upon complaint by a union member after he has exhausted his internal union remedies, to bring an action in federal district court to redress such violations. The latter provision stipulates that, if the court finds that a violation occurred which "may have affected the outcome of an election," it "shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary * * *." In each of the cases at bar, the Secretary brought a suit under this provision challenging a union election and while his suit was pending on appeal the union held its next election. Both courts of appeals dismissed the appeals as moot by reason of the new election. The principal question presented is the correctness of this disposition.

A case becomes moot when the relief sought becomes futile, impossible or academic. *E.g., California* v. *San Pablo & Tulare R.R.*, 149 U.S. 308. Thus, a suit to replevy a specific article would be moot if, prior to judgment, the article was returned to the

plaintiff, or destroyed. These suits by the Secretary of Labor are moot if, by reason of the intervening elections, he is no longer entitled to orders directing new elections under his supervision even if he establishes that the previous elections are void.

The language of the Labor-Management Reporting and Disclosure Act lends no support to the view of the courts below that the intervening elections cut off the Secretary's right to the relief asked. The Secretary is entitled to such relief, under Section 402, when a violation has occurred "which may have affected the outcome of an election," and there is no provision equating "an election" with "the immediately preceding election." No such gloss was suggested in the debates preceding enactment. Nor is that result indicated to us when we look to the general purposes and overall design of the Act.

To be sure, if the Act were concerned to protect only the private right of a union member to run for a particular union office in a particular election, there might be some merit to the argument that, once the term of office to which the candidate aspired has been terminated by the election of new officers, he is no longer entitled to complain about the old election. But even the courts below did not adopt so narrow a view of the purposes of the Act. They conceded the Secretary's interest in the electoral process beyond the immediate term of office in issue by endorsing the Second Circuit's suggestion that the Secretary, to prevent his suit from becoming moot, may ask to enjoin the holding of a new election and thus to perpetuate the incumbents in office beyond their

prescribed term.[1] As we show presently (*infra,* pp. 17–19), the Act is intended to do more than protect a candidate's right to run in a particular election: the objective is to ensure a democratic electoral process. And that purpose, as we shall demonstrate (*infra,* pp. 19–38), requires that the courts be free to order a new election, supervised by the Secretary, notwithstanding that the union has held another election in the interim.

A. THE POLICY OF TITLE IV IS TO ENSURE FAIR AND DEMOCRATIC UNION ELECTIONS

The policy underlying Title IV is stated at the outset of the Act (29 U.S.C. 401):

> The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to * * * choose their own representatives.

Thus, although some of the bills before Congress would have permitted the complaining union member to sue in his own right (S. 748, 86th Cong., 1st Sess., 105 Cong. Rec. 1276; H.R. 8342, 86th Cong., 1st Sess., 105 Cong. Rec. 15887), the Act as finally passed provided that a suit by the Secretary of Labor was to be the exclusive post-election remedy. 29 U.S.C. 483. So providing, "Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the *public*

[1] See *Wirtz* v. *Local Unions 410, Etc.*, 366 F. 2d 438; *Wirtz* v. *Local Unions Nos. 545, Etc.*, 366 F. 2d 435. We explain *infra*, p. 34, why the Second Circuit's suggestion does not provide a suitable means of implementing the Secretary's continuing interest in the union's electoral process.

interest." Calhoon v. *Harvey,* 379 U.S. 134, 140 (emphasis added). The focus is on the right of *all* the union members to be governed by officials who are "responsive to the desires of the men and women whom they represent." S. Rep. No. 187, 86th Cong., 1st Sess., p. 20; H. Rep. No. 741, 86th Cong., 1st Sess., p. 16. Of course, Congress also viewed Title IV as a means whereby losing or disqualified candidates could receive the assistance of the federal government in vindicating their rights (see 104 Cong. Rec. 10947 (remarks of Senator Kennedy); but this is not the sole office which Title IV performs.

One indication of the broader interest protected is that the Secretary's power to institute a suit under this title does not depend on complaint being made by a losing or disqualified candidate; the only prerequisite to suit is a complaint (after exhaustion of internal union remedies) by "a member" of the union (29 U.S.C. 482(a))—by any member (S. Rep. No. 187, 86th Cong., 1st Sess., p. 13) who feels aggrieved by the electoral result. The complaint-and-exhaustion requirement is designed primarily to preserve "a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections" (S. Rep. No. 187, 86th Cong., 1st Sess., p. 21), with a secondary purpose being to confine the Secretary's intervention to situations in which the electoral abuse is grave enough to move at least one member of the union to complain; and these objectives are completely consistent with the view that the basic purpose of Title IV is to ensure representative union leadership—to protect the

voter—rather than merely to advance the interests of aspirants for union office.

We next show that this purpose would often be thwarted unless the Secretary's right to relief survived a new election.

B. REPRESENTATIVE UNION LEADERSHIP CANNOT BE ASSURED IF THE HOLDING OF A NEW ELECTION BY THE UNION PRECLUDES THE IMPOSITION OF ANY SANCTION FOR A PREVIOUS UNLAWFUL ELECTION

Superficially, it might seem that the adverse effects on union democracy of an election whose outcome might have been affected by a violation of Section 401 would wash out when the union held its next election. In many instances, however, the taint of the original election infects the next and is curable only by the Secretary's "laboratory" election.

The facts of No. 57 illustrate this in striking fashion. On remand, the Secretary proved that at the union's second election in October 1965—the event the court of appeals later held mooted his action—the attendance requirement of the union's bylaws which had given rise to the suit was again used to disqualify candidates, despite the decision of the district court on August 26, 1965, holding this limitation unlawful. As a result of the requirement only 13 of 500 members were eligible to run for office at the 1965 election and only 8 candidates actually ran. Indeed, the union's electoral process was so distorted that there were no candidates at all for the three trustee offices, which the union's bylaws require be filled electively, and it became necessary for the president of the union to appoint the three incumbent trustees (as he had done

after the previous election in 1963) although they were ineligible under the attendance requirement to run for the office.

Thus the taint of the challenged election persisted in the succeeding one; the results of the latter were no more representative than that of the former. The second election made the statutory remedy of a laboratory election no less needful.[2] And that would be true

[2] Before the decision of the Court of Appeals for the Second Circuit in *Wirtz* v. *Local Unions 410, 410A, 410B & 410C, International Union of Operating Engineers, supra*, the district courts had generally upheld the Secretary's right to file a supplemental complaint, without any renewal of the initiating procedures of internal protest, complaint to the Secretary, investigation, and finding of probable cause, when the alleged violations giving rise to a pending Title IV suit were repeated in a subsequent election. *Goldberg* v. *Trico Workers Union*, 53 L.R.R.M. 2875 (W.D.N.Y.); *Wirtz* v. *Local 559, United Brotherhood of Carpenters and Joiners*, 60 L.R.R.M. 2522 (W.D. Ky.); *Wirtz* v. *Research, Development and Technical Employees Union* (D. Mass., Civil Action No. 64–567–W, 1965); *Wirtz* v. *Local Union 825, 825A, 825B & 825C, International Union of Operating Engineers* (D. N.J., Civil Action No. 438–63, 1965); *Wirtz* v. *Local 84, Glass Bottle Blowers Association* (D. Kansas, Civil Action No. KC–2140, 1966). The procedure followed in these cases was consistent with the decisions of this Court in the closely analogous situation presented in National Labor Relations Board unfair labor practice proceedings. The Board, like the Secretary of Labor under Title IV of our Act, may act only upon receipt of a complaint, or a charge, from an aggrieved party. However, the Board is not precluded from "dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 369; *Labor Board* v. *Fant Milling Co.*, 360 U.S. 301, 306–307, 309. Similarly, here, the Secretary and the courts should be free to deal with violations related to those alleged in the complaint which take place during the pendency of the litigation,

even if the union had not actually applied its unlawful condition of candidacy, for there would have been no assurance, without a supervised election, that the union members had been adequately notified of the elimination of the unreasonable attendance requirement.[3] Certainly, the continuing need for a laboratory election exists when it is not known whether the violation giving rise to the Secretary's suit persisted into the second election.

Such is the case in No. 58. There is no evidence whether the violation was repeated in the unsupervised portion of the 1966 election.[4] But, in any event, the remedy of a laboratory election closely supervised and controlled by the Secretary is designed not merely to assure the discontinuance of the particular violation found—an objective that could as well be achieved by empowering the court to enjoin violations (see *infra,* pp. 34–37). Of equal importance, the laboratory election serves—more effectively than alternative devices—to neutralize the inherent advantages of the

[3] One of the procedures which the Secretary follows at supervised elections is to hold a pre-election conference, open to the membership, at which ground rules for the election are adopted.

[4] The Department of Labor advises us that its representatives who supervised the election for Business Representative were not in a position to determine whether ineligible members either ran for office or voted at the election for the other offices. Although the supervised and unsupervised elections took place at the same time and in the same hall, separate ballots and separate ballot boxes were used, and there were two separate lines of voters. Thus, so far as the Department knows, persons ruled ineligible to vote at the supervised election could have voted at the unsupervised election, and persons ineligible to run at the supervised election could have run at the unsupervised election.

unlawfully elected incumbents in perpetuating their office in subsequent elections through control of the electoral machinery, using techniques which are not demonstrably unlawful but which nonetheless favor incumbents. Unless a supervised election is conducted to break this cycle of control a single invalid election may taint several which follow it.

The procedural standards for elections which the 1959 Act and most union constitutions and bylaws establish leave to those administering the elections considerable room for maneuver. To be sure, the Act contains specific provisions for ensuring equality of treatment with respect to mailing of campaign literature; requires "adequate safeguards to insure a fair election" including the right of any candidate to have observers at the polls and at the counting of ballots; and guarantees "reasonable opportunity" for the nomination of candidates, the right to vote without fear of reprisal, and the right of every member in good standing to be a candidate, subject to "reasonable qualifications uniformly imposed." 29 U.S.C. 481 (c), (e). Nevertheless, when the incumbent officers control the details of the election process, they are in a position to make decisions regarding election procedure which favor the incumbent slate yet cannot be shown, in a post-election suit, to have been illegal or, if illegal, to have been sufficiently important to the outcome to justify setting aside the election. As one distinguished student of the subject has remarked (Summers, *Judicial Regulation of Union Elections,* 70 Yale L.J. 1221, 1228–1229 (1961)):

> The problem of maintaining equality in a contested election is aggravated by the fact that control of the process is commonly in the hands of one of the competing factions. The lack of any established two-party system in most unions hinders the development of devices for sharing control between the opposing groups. * * *
>
> Normally union officers control the election process. They call and preside at the nomination meeting, rule on the qualifications of candidates, design the ballot, fix the time and place of the election, and rule on the qualifications of voters. Many of these functions may be vested in an election committee, but * * * the administration group often dominates this committee. Although those in control are governed by the union constitution, its sketchy provisions leave substantial room to maneuver for critical advantages.

These dangers were known to the framers of Title IV, enacted as it was against the background of an extensive congressional inquiry which revealed how some union officials had been able to perpetuate their control of union office. See *Interim Report of the Select Committee on Improper Activities in the Labor or Management Field,* S. Rep. No. 1417, 85th Cong., 2d Sess. Congress was aware that incumbent union officers enjoy considerable advantages in seeking reelection and that undemocratic procedures followed in one election can have a continuing impact on the outcome of subsequent elections. Provision was made for a supervised election to break the cycle. The Secretary was authorized to establish procedures for the supervised election which are designed not only to en-

sure that the election is conducted in a lawful manner under the union's constitution and bylaws [5] but also to deny the incumbent officers any opportunity to favor the administration slate in making decisions—and he has done so.[6]

In sum, in regular, unsupervised elections the union itself determines the details of election procedures, because Congress wished only to prescribe minimum standards of fair procedure for union elections, believing that unions generally could be trusted with responsibility to work out the details of their own internal procedures in a fair manner. S. Rep. No. 187, 86th Cong., 1st Sess., p. 7. But once the Secretary has shown that a union has committed a violation of the Act which may have affected the outcome of an election, that trust is forfeited and it becomes

[5] The supervised election must be held, "so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization." 29 U.S.C. 482(c). However, subject to that limitation, the Secretary is authorized to prescribe rules and regulations for the conduct of supervised elections. 29 U.S.C. 482(b).

[6] This is done principally by ensuring that incumbent officers do not control the election committee or otherwise decide the details of the election procedure. Thus, at a supervised election, the principal details are determined by the Department of Labor's supervisor in consultation with all interested parties at a pre-election conference. Matters remaining unsettled after the pre-election conference may be left to a union election committee, but incumbent officers seeking re-election, as well as other candidates for office, are not permitted to serve on the election committee. Where the union's constitution requires incumbent officers to perform functions in connection with the election, the incumbent seeking re-election must perform these functions under supervision and, upon request, under the observation of representatives of rival candidates.

necessary for the Secretary to control the details of the election procedure through supervision of a court-ordered election. The violation destroys the presumption of regularity that would otherwise attach to the union's conduct of its own election; the intervention of an unsupervised election is not sufficient to restore it. Even if it cannot be shown in a post-election investigation that the intervening election was conducted in violation of the Act, there can be no assurance that the unlawfully elected incumbents forewent the opportunities for manipulation that an unsupervised election permits. A laboratory election remains necessary to assure that the control achieved by violating the Act in the first election is not perpetuated by subtle means in the second.[7]

[7] The continuing public interest in the Title IV remedy, once suit has been validly initiated, was forcefully expressed by the court in *Goldberg* v. *Amalgamated Local Union No. 355*, 202 F. Supp. 844 (E.D.N.Y.), where the Secretary had filed suit to compel the holding of a local union election after the lapse of more than three years since the last election. After the suit was filed, the union held an unsupervised election. The court refused to dismiss the complaint, saying:

> The filing of the complaint under the procedure outlined by Congress sets in operation the governmental machinery. To that point, the LMRDA gives the labor organization the opportunity to correct and remedy the violations. Beyond that point, the right of the government to investigate the breakdown of the democratic processes is clear. It is not within the power of the labor union to deprive the government of its right by compliance. The interest of the public goes beyond adherence to the form. The interest of the public has been called into play by the failure of the union to act. The substantial right of the Secretary cannot be capriciously brushed aside. [202 F. Supp. at 846.]

So saying, we suggest no novel principles. It is familiar law that the discontinuance of the particular practice challenged does not defeat the government's right to relief against a violation of law, unless it is clear that a decree is unnecessary to protect the public against the consequences of the violation.[8] This is such a case. Full protection of the public interest is not assured by the mere fact that a subsequent election is conducted, even if the challenged practice appears to have been abandoned.

Also relevant is the principle that when important rights have been violated the remedy may go beyond restraining the plainly unlawful conduct and prohibit associated acts which would be permissible at the hands of others, or even the defendant, had they not been used to perpetrate the wrong. *E.g., United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 724; *May Department Stores Co.* v. *Labor Board*, 326 U.S. 376, 391; *Swift & Co.* v. *United States*, 276 U.S. 311. The effect of the relief asked by the Secretary in these

[8] See, *e.g.*, *Labor Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416; *Local 74, Etc.* v. *Labor Board*, 341 U.S. 707; *Porter* v. *Lee*, 328 U.S. 246; *Walling* v. *Helmerich & Payne*, 323 U.S. 37; *Walling* v. *Reuter Co.*, 321 U.S. 671; *Federal Trade Commission* v. *Goodyear Co.*, 304 U.S. 257; *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261; *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498; *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290; *Mitchell* v. *Southwest Engineering Co.*, 271 F. 2d 427 (C.A. 8); *Marlene's Inc.* v. *Federal Trade Commission*, 216 F. 2d 556 (C.A. 7); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C.A. 8); *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307 (C.A. 7); *Goldberg* v. *Amalgamated Local Union No. 355*, 202 F. Supp. 844 (E.D.N.Y.); *United States* v. *Bates Valve Bag Corp.*, 39 F. 2d 162 (D. Del.).

cases may be to undo elections not themselves shown to be illegal, but that is necessary to assure the complete extirpation of proven wrongful conduct. Under the Voting Rights Act of 1965, a State may not enforce a literacy test, even a lawful one, if such a test was used at any time during the previous five years to abridge the right to vote on account of race or color. "Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334. And both the registration and the voting process in areas where persistent violations have occurred are subject to detailed federal supervision. See 42 U.S.C. 1973 *et seq.* Here, too, something more than the abandonment of an unlawful practice is required to overcome the effects of past illegality and restore democracy.

It remains only to consider whether, within the framework of Title IV, there is any adequate alternative remedy for assuring that the taint of an unlawful election is thoroughly dissipated, other than directing a laboratory election notwithstanding an intervening unsupervised election.

C. THERE IS NO OTHER EFFECTIVE REMEDY UNDER TITLE IV TO ASSURE THE ELIMINATION OF THE ADVERSE EFFECTS OF AN UNLAWFUL ELECTION

We canvass here the possible alternative methods of guaranteeing representative union leadership in a situation where the union holds another election following the unlawful one—alternatives to the Secre-

tary's preferred remedy of an order in the suit challenging the first election directing that a new election be conducted under his supervision, without regard to the fact that the union has already held its next election.

1. Expedited proceedings

It is readily apparent that, in the ordinary course, a suit by the Secretary to declare an election void and obtain an order directing a laboratory election will more often than not be overtaken by the union's next election before it is prosecuted to its conclusion—as happened in the cases at bar. The Act itself requires unions to hold elections at least once every three years (29 U.S.C. 481(b)); many unions (including the local involved in No. 57) hold elections biennially; and some even conduct annual elections.[9] The Secretary cannot, under normal circumstances, institute an action in the district court until at least six months after an election,[10] and in most cases a trial is necessary since the issues—what procedures were followed, whether a particular practice was unreasonable in the

[9] At least 3.5 million local union members elect their officers at intervals of two years or less. United States Department of Labor, *Union Constitutions and the Election of Local Union Officers* (1965), Table 5, p. 22.

[10] First, a member must complain to the union. The union then has three months to render a final decision, and the union member one month after that to file a complaint with the Secretary. 29 U.S.C. 482(a). Sometimes the member awaits the union's final decision, which may take considerably more than the statutory minimum of three months, before filing a complaint. The Secretary then has sixty days to conduct the administrative investigation that is required before the suit may be brought. 29 U.S.C. 482(b).

circumstances, and whether violation, if established, may have affected the outcome of the election—usually involve disputed questions of fact. Thus, many times even the district court's judgment may be delayed until the next regular election. The danger is likely to be aggravated if unions know that to moot these suits they need only delay the proceedings until their next election.

If appeals are taken, it becomes virtually impossible to terminate the litigation (including action on an application for review by this Court) before the next biennial or triennial union election. To be sure, this holds true only if the district court refuses to order a supervised election and the Secretary appeals; Section 402(d) of the Act bars a stay pending appeal of a district court order directing a supervised election. However, as these cases illustrate, it is not uncommon for district courts to refuse the Secretary the relief he asks, and it seems hardly reasonable to suppose that Congress intended no judicial review of lower court rulings sharply curtailing the scope and efficacy of Title IV.[11]

The vital importance to the effective and orderly administration of Title IV of permitting the Secretary to obtain appellate review is well illustrated by the two cases at bar. No. 57 involves the nature of the

[11] As a matter of fact, it is clear that Congress contemplated judicial review of election orders—which the mootness holdings of the court below hobbles. Compare Section 402(d) of the final Act, which expressly makes election orders appealable, with earlier bills providing that orders directing an election not be appealable (S. 3974, 85th Cong., 2d Sess., 104 Cong. Rec. 18263, and S. 3751, 85th Cong., 2d Sess.).

burden of proof resting on the Secretary to show that a violation of the Act "may have affected the outcome of an election."[12] Since the Secretary will not institute court proceedings unless he believes that the burden can be satisfied,[13] the resolution of the question presented will shape the course of future investigations, and will in some instances control the decision whether suit should be filed. So, also, the question in No. 58, concerning the proper scope of the Secretary's complaint, has obvious practical importance for the whole Title IV enforcement program. Before the order dismissing portions of the complaint in this case, the Secretary had successfully maintained in the district courts his view that a valid complaint from a union member opens to investigation and judicial challenge the whole electoral process.[14] Since that de-

[12] The same ruling has been reached more recently, on only slightly different facts, in *Wirtz* v. *Local 66, Glass Bottle Blowers Association*, 268 F. Supp. 33 (W.D. Pa.), June 1, 1967, which involves the same meeting attendance requirement. Since Local 66 is scheduled to hold its next regular election in September 1967, it is highly unlikely that an appeal can be completed in time under the Third Circuit's mootness holding.

[13] The Interpretative Bulletin issued under the Act states (at 29 C.F.R. § 452.16(b)): "Violations of the election provisions of the Act which occurred in the conduct of elections held within the prescribed time are not grounds for setting aside an election unless they 'may have affected the outcome.' The Secretary, therefore, will not institute court proceedings upon the basis of a complaint alleging such violations unless he finds probable cause to believe that they 'may have affected the outcome of an election.'"

[14] Decisions favorable to the Secretary on this question had been rendered without opinion in *Wirtz* v. *Local 11, Hod Carriers* (ruling specifically referred to in 211 F. Supp. 408, at 412 (W.D. Pa.)); *Wirtz* v. *Local 611, International Hod Carriers' Union*, Civil No. 9512, D. Conn., motion for summary

cision, numerous Title IV defendants have raised the defense that the complaint went beyond the scope of the complaining member's internal protest.[15] If the Secretary's view of his duty and authority under Title IV is correct, then he should not be required to litigate this question repeatedly. On the other hand, if the decision of the district court in this case was correct, then the Secretary should not be wasting his resources by full investigation of election complaints followed by comprehensive litigation based on his investigative findings.

While efforts at expedition might alleviate the problem to some extent, it is obvious that even expedited proceedings frequently cannot terminate a litigation involving both trial and appeals, as No. 58 illustrates. Had the Secretary sought leave to pursue an interlocutory appeal from the order dismissing portions of the complaint, it is doubtful whether even a district court decision could have been rendered on the merits before the union's next election. Moreover, the courts can expedite only the judicial, and not the anterior administrative, proceeding. That limitation aside, undue haste in the processing of election complaints at the administrative level could actually un-

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judgment denied July 15, 1963; and *Goldberg* v. *District Council 21, Brotherhood of Painters*, Civil No. 30371, E.D. Pa., motion to dismiss denied March 31, 1962.

[15] See *Local Unions Nos. 545, 545-A, 545-B, & 545-C, International Union of Operating Engineers* v. *Wirtz*, C.A. 2, No. 499, decided July 28, 1967; *Wirtz* v. *Hotel, Motel and Club Employees Union, Local 6*, C.A. 2, No. 513, decided July 28, 1967; *Wirtz* v. *Local 9, etc., Operating Engineers*, 366 F. 2d 911 (C.A. 10), certiorari granted and decision vacated, May 15, 1967 (see p. 39, n. 22, *infra*) which followed the narrow view of the instant case.

ermine the policies of Title IV. The Secretary may ot bring suit unless and until the union has failed oluntarily to comply with the law. This requirement, s this Court pointed out in *Calhoon* v. *Harvey*, 379 .S. 134, 140, "is in harmony with the general con- ressional policy to allow unions great latitude in esolving their own internal controversies, and, where hat fails, to utilize the agencies of Government most amiliar with union problems to aid in bringing about settlement through discussion before resort to the ourts." [16] Since settlement efforts frequently take ime, the Secretary often obtains waivers in order to ermit the negotiations to extend past the sixty-day eriod allowed by the Act for bringing suit.[17] Fear of hootness, however, may induce the Secretary to file uit as quickly as possible, regardless of the effect on ettlement efforts,[18] while at the same time it may en-

[16] In fiscal years 1963, 1964 and 1965, an average of 124 com- laints per year were received by the Secretary, and an average f 17 complaints were filed in court. See Bureau of Labor- Management Reports, *Summary of Operations, 1963*, pp. 8, 11; U.S. Department of Labor, *Summary of Operations, 1964, Labor-Management Reporting and Disclosure Act*, p. 6; U.S. Department of Labor, *1965 Summary of Operations, Labor-Management Reporting and Disclosure Act*, p. 7.

[17] In some cases, the holding of a supervised election is pro- vided for by the settlement. Considerable time must be taken in preparing for the supervised election, during which interval the Secretary preserves his right to file a complaint by obtaining waivers of the limitations defense.

[18] To be sure, settlement negotiations may continue after the iling of a suit. However, the commencement of litigation gen- rally stiffens the position of the parties and makes settlement nore difficult. For example, before suit is filed the union may e amenable to settlement because it wishes to avoid the adverse ublicity of a lawsuit, but this factor, of course, disappears nce the suit is filed.

courage the union to engage in protracted negotiations so as to frustrate judicial enforcement should agreement not be reached. Either way a climate of voluntary compliance is impaired.

2. A new suit challenging the second election

This alternative may be quickly dismissed. Such a suit would be just as likely as the first suit to be overtaken—and hence, under the rule of the courts below, mooted—by the union's next election. And it would be no remedy at all in cases (like No. 58) where the vice of the second election lies, not in the fact that the union continues to impose the restriction challenged in the first suit, but in the danger that the officers elected unlawfully in the first election may have been able to perpetuate their office in the second through their control of the electoral machinery, without, however, committing any demonstrable violation of law.

Nor is the futile remedy of a second suit mandated by the complaint-and-exhaustion requirement of the Act. Where, as in No. 57, the union has already refused to change its candidacy qualifications, there would be little point in requiring a union member again to file an internal complaint and exhaust internal remedies. Moreover, a member of Local 153 who could not meet the attendance requirement in 1965 would not be likely to renew his attempt to run for office and then pursue an internal complaint if disqualified, knowing that the previous attack on the attendance requirement at the 1963 election had failed. If, as in No. 58, the second election is not provably

marred by a violation of Title IV, the member would have no basis in the Act for filing any new complaint.

3. An injunction against the holding of another election pending completion of the Secretary's suit

The Second Circuit has suggested that the Secretary might obtain, *pendente lite,* a stay of an election that would moot his Title IV action (see pp. 16–17 and n. 1, *supra*). This remedy, which has no foundation in the Act, seems completely anomalous. It places the Secretary in the untenable position of asking the court to maintain in office, beyond the expiration of their terms, the very union officials whose election he is challenging as unlawful. It unwarrantedly interferes with the union's rules prescribing the intervals at which elections should be held in disregard of the congressional policy of minimum interference in union electoral affairs (*supra,* p. 18). In some cases it may even conflict with the Act's explicit directive that union elections be held no less often than every three years. And it is inconsistent with at least the spirit of Section 402(d). That provision precludes a stay pending appeal of an order directing a supervised election, thus indicating, we think, that Congress did not intend that elections should be delayed owing to the pendency of Title IV litigation.

4. An injunction against the practice found to violate the Act

Arguably, the Secretary should be free to challenge not only the election itself, but the unlawful electoral practice, and to obtain an injunction against the continuation of the practice in any future election. However, in many cases this remedy would be wholly

inadequate. It would do nothing to prevent unlawfully elected officers from perpetuating their office by control of the electoral machinery—only a laboratory election is calculated to eliminate this harmful effect of an unlawful election. Beyond this, it is very doubtful that the Act empowers the courts to afford such injunctive relief, at least in the kind of case involved here. *Wirtz* v. *Hotel, Motel and Club Employees Union, Local 6,* C.A. 2, No. 513, decided July 28, 1967.

Title IV does not expressly provide for injunctive relief. The only remedy specifically provided in the statute is an order setting aside the challenged election and directing a supervised election. While the absence of express provision for injunctive relief is not, of course, conclusive (cf. *United States* v. *Republic Steel Corp.,* 362 U.S. 482), there is evidence that the omission here was deliberate.

For one thing, the enforcement provisions of other titles of the Act provide specifically for injunctive relief. Sections 102, 210, 304, 29 U.S.C. 412, 440, 464. Particularly relevant here is the enforcement section of Title III (Trusteeships), which permits the Secretary to obtain "such relief (including injunctions) as may be appropriate." 29 U.S.C. 464. Title III is otherwise quite similar to Title IV in its enforcement provisions. It provides (29 U.S.C. 464) for complaint by a union member, investigation of the complaint by the Secretary, a finding of probable cause by the Secretary to believe there has been a violation, and then a civil action by him. It seems unlikely that the omission from Title IV of the provision for injunctive relief found in Title III was completely inadvertent.

Moreover, several of the bills rejected by the Congress would have expressly authorized injunctions against future violations of the election provisions. The principal House bills—including the version that passed the House—provided for a civil action "to prevent and restrain such violation [of section 401]." H.R. 8342, 86th Cong., 1st Sess., Section 402(a), 105 Cong. Rec. 15707–15708, 15887; H.R. 8400, 86th Cong., 1st Sess. Both the administration's Senate bill and Senator McClellan's bill also provide for injunctions. S. 748, 86th Cong., 1st Sess., Section 302(d), 105 Cong. Rec. 1277; S. 1137, 86th Cong., 1st Sess., Section 403(a), 105 Cong. Rec. 2666. Nevertheless, the final Act did not provide injunctive relief for violations of Title IV.

Perhaps, in some extraordinary cases, a remedy not expressly provided in Title IV should be implied to achieve the overall congressional purposes. Thus, for example, when a union held a new election under the Secretary's supervision but refused to install the officers elected, suit was filed to compel their installation.[19] When ballots were altered before a recount to change the result of an election, the Secretary filed suit for the installation of the candidate who had received the most votes.[20] In these cases, since the elec-

[19] *Wirtz* v. *Local 85, Laborers' International Union*, D. Ore., Civil Action No. 66–221. After a pre-trial hearing, the union agreed to install the officers elected in the supervised election.

[20] *Wirtz* v. *Local 36, United Automobile Workers*, E.D. Mich., S. Div., Civil Action No. 27901. The case was eventually settled by installation of the properly elected candidate. The problem in that case was similar to one that occurred in the election of the national president of the International Union

tion itself was not tainted by illegality, to have directed a re-run would needlessly have interfered with the union's electoral process, contrary to the congressional scheme. Therefore, it was urged that a proper order would be one limited to the invalid portion of the election, *i.e.*, the installation of officers.[21] And in *Wirtz* v. *Local 1752, ILA,* 56 L.R.R.M. 2303, 2306 (S.D. Miss.), the court enjoined the union from post-election discrimination against the member who had filed a Section 402 complaint, noting that "the Secretary of Labor's enforcement responsibilities would be thwarted and the public interest harmed" if a complainant could not be protected from such reprisal.

Clearly, however, the usual statutory remedy for an illegal election—and, as mentioned, in many cases the only effective one—is a laboratory election; and in the present cases, such relief is appropriate and should be deemed available.

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of Electrical, Radio and Machine Workers in 1964. An investigation by the Secretary of Labor disclosed that the ballots had been miscounted. The candidate who had erroneously been declared elected resigned, and his opponent was installed in office. See U.S. Department of Labor, *1965 Summary of Operations, Labor-Management Reporting and Disclosure Act*, pp. 7–8; 88 *Monthly Labor Review* 562–565 (1965).

[21] But in *Wirtz* v. *Teamsters Industrial and Allied Employees Union, Local No. 73*, 257 F. Supp. 784 (N.D. Ohio) the court denied a motion to dismiss a complaint alleging, *inter alia*, that certain newly-elected officers had been improperly coerced into resigning immediately following their installation. There, an adaptation of the statutory remedy would have been unavailable, since the alleged violation occurred after the election was over. (The case was settled.)

In sum, within the framework of Title IV, effective relief against unlawful elections will in many cases be impossible unless the Secretary's right to an order directing a supervised election is recognized, whether or not the union has held another election since the one challenged in the Secretary's suit. In the circumstances, the Court would be fully justified in fashioning a remedy appropriate to carry out the statutory purpose. Compare *United States* v. *Republic Steel Corp.*, 362 U.S. 482; *Texas & N.O.R. Co.* v. *Ry. Clerks,* 281 U.S. 548. But no creative effort is required here. Nothing in Title IV makes an intervening union election a bar to an order directing a laboratory election if the previous election was voidable. We plead only for a liberal application of the statute, faithful to its true purpose.

II. IN NO. 58, THE DISTRICT COURT ERRED IN HOLDING THAT THE SECRETARY IN HIS SUIT MAY NOT CHALLENGE THE GENERAL ELECTION IN WHICH THE VIOLATION COMPLAINED OF OCCURRED, OR CHALLENGE THE ELECTION OF OTHER OFFICERS, BECAUSE THE UNION MEMBER SPECIFICALLY CHALLENGED THE VIOLATION ONLY AS IT AFFECTED THE RUN-OFF ELECTION HELD WITH RESPECT TO A SINGLE OFFICE FOR WHICH THE COMPLAINANT WAS A CANDIDATE

In dismissing the appeals in these two cases as moot, neither court of appeals considered whether the district court had been correct in its ruling on the merits of the Secretary's complaint. If this Court agrees with us that the appeals are not moot, it could of course remand the cases to the courts below to consider the merits of the appeals. On the other hand,

it would not be inappropriate to now resolve the important questions involved (which we discuss in this and the following part of our argument). The issue in No. 58 especially—whether the Secretary's suit may raise issues not specifically presented in the internal complaint—is closely related, as will appear, to the mootness question; and it has been fully considered by two courts of appeals already.[22] Moreover, both questions are extremely important to the administration of Title IV and should be decided promptly in order to provide guidance in the mounting litigation under the Act.

We begin with No. 58. The issue presented by the Secretary on his appeal was whether the district court erred in striking those portions of the Secretary's complaint directed to the conduct of the general election on June 8, 1961, and concomitantly, in limiting the supervised election to a single office, that of Business Representative.[23]

The complaint to the union specifically questioned only the run-off election held on July 13, 1963, for the

[22] See cases cited *supra*, p. 31, n. 15. Our petition for a writ of certiorari to review the decision in *Wirtz* v. *Local Unions Nos. 9, 9–A and 9–B, International Union of Operating Engineers*, 366 F. 2d 911 (C.A. 10), presented this question, but shortly thereafter, the respondent agreed to allow the Secretary to supervise the election of all officers, rather than only that involving the office with respect to which an administrative complaint had been filed. Accordingly, at the joint suggestion of the parties, the Court, on May 15, 1967, vacated the judgment below and ordered the suit dismissed as moot.

[23] The run-off election challenged in the union member's complaint involved only that office since it was the only one as to which the general election had resulted in a tie, requiring a run-off.

office of Business Representative. The complaint charged that that election had violated Title IV in that some members ineligible to vote because of non-payment of dues had been allowed to vote while others ineligible on that ground had been prevented from voting. The court directed a supervised election limited to a re-run of the run-off election for this post. Despite the Secretary's allegation that the same violation had occurred at the preceding general election, held on June 8, 1963, and had tainted the races for all offices, the court did not permit the Secretary to challenge the validity of the general election. In our view this was error.

A. THE ADDITIONAL ISSUES RAISED IN THE SECRETARY'S COMPLAINT WERE FAIRLY WITHIN THE SCOPE OF THE UNION MEMBER'S COMPLAINT TO THE UNION

Title IV, as already noted, provides that before filing suit the Secretary of Labor must receive a complaint from a union member who either exhausted his internal remedies within the union or invoked such remedies without obtaining a final decision within three months. 29 U.S.C. 482 (a), (b). Although the language of the statute is not entirely unambiguous, it appears that the Secretary's suit may only question the election that was the subject of the union member's internal complaint.[24] Since both the general election

[24] Section 402(a), 29 U.S.C. 482(a), provides that the "challenged election [referring to the election challenged by the union member in his complaint to the Secretary] shall be presumed valid pending a final decision thereon (as hereinafter provided) * * *." The statute goes on to authorize a suit by the Secretary "to set aside the invalid election * * *." 29 U.S.C. 482(b). The court is directed, if it finds that a violation may

held on June 8, 1963, and the run-off held on July 13, 1963, were part of a single process designed to select the officers of the union for the following three years, we view both together as constituting a single "election" for purposes of the statute.[25]

This common sense result is strongly suggested by the scheme of the Act. Title IV provides the exclusive remedy "for challenging an election already conducted" (Section 403) and it permits a protest and court challenge only after the election has been completed. See *Wirtz* v. *Local 30, International Union of Operating Engineers,* 242 F. Supp. 631, 633 (S.D.N.Y.) (citing this Court's decision in *Calhoon* v. *Harvey,* 379 U.S. 134); *Wirtz* v. *Great Lakes District Local 47, Masters, Mates & Pilots,* 61 L.R.R.M. 2010 (N.D. Ohio). An election that requires a run-off has not been completed. Moreover, Section 402(c) provides for judicial relief only if it is shown that a violation of the Act "may have affected the outcome of an election." Obviously, the outcome of an election which necessitates a run-off cannot be known until the completion of the run-off. Yet if the run-off in a case like No. 58 were viewed as a separate election, the complainant would have to lodge his internal union protest prematurely—before the run-off was held—since more than the 30-day period provided in respondent's constitution for the filing of election

have affected the outcome of "an election," to declare "the election" void and direct the conduct of a new election under the supervision of the Secretary. 29 U.S.C. 482(c).

[25] Webster's *Third International Dictionary* defines "election" as "the act or process of choosing a person for office, position, or membership by voting."

protests elapsed between the general election and the run-off.[26]

Defining "election" in this manner is fully consistent with the internal exhaustion requirement of Title IV, which was designed to preserve "a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections." S. Rep. No. 187, 86th Cong., 1st Sess., p. 21; see *supra*, p. 18. When the international union received a complaint that the local had been following a practice which resulted in improperly qualifying certain members to vote, the international should have realized that the same practice had probably been followed in the general election which preceded, and necessitated, the run-off. And any serious investigation of the complaint would have shown that the Secretary Treasurer's practice of subsidizing the eligibility of some union members was enforced, not only at the run-off election, but also at the general election, held only six weeks previously. Thus, the policy of the exhaustion requirement—giving the union a chance to clean its own house—is served by permitting the Secretary to sue in respect of the general election on the basis of a complaint about the conduct of the run-off.

[26] We do not mean to imply that a run-off cannot be separately considered for any purpose under Title IV. If purely procedural irregularities are involved (*e.g.*, denial of a secret ballot, or failure to give the 15-day statutory notice), then the run-off may be the only defective part of the election, and the only part which requires corrective action. However, in the present case, the violations infecting the run-off were merely the continuation of the violations permeating the general election, and attributable to the same cause.

Once it is acknowledged that the run-off election was an integral and inseparable part of the general election which necessitated it, then the question arises whether the Act's internal-exhaustion requirement provides any justification for restricting the Secretary's suit to the particular office concerning which complaint was made. We submit that the purpose of the exhaustion requirement is not undermined by permitting the Secretary to question the election for other offices besides the one specified in the internal complaint, particularly where, as here, the same violations were alleged with respect to those other offices. The international cannot complain, in these circumstances, that it was deprived of an opportunity for voluntary correction by being confronted with the violation for the first time in the Secretary's suit. The illegality was fully disclosed by the internal complaint, albeit it focused only on a single union office.

There might be merit in the argument that the Secretary's suit is limited to the office as to which an internal complaint was made—despite the fact that the violation specified in the complaint affected other offices—if the Secretary's sole function in Title IV litigation were to vindicate the rights of a disappointed candidate. On this theory, since the complaining member in No. 58 asserted only his interest in running for the office of Business Representative, the Secretary's suit on his behalf should be similarly limited. However, as already explained (*supra*, pp. 17–19), the Secretary has a broader role in Title IV litigation: to represent the interest of all the members of the union in having officers responsive to their

needs and to assert the public interest in democratic labor unions. As this Court noted in *Calhoon* v. *Harvey*, 379 U.S. 134, 140, "Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest." The "special knowledge" of the Secretary would be poorly utilized if he could function under Title IV only as the champion of a particular complainant.

B. EVEN UNRELATED VIOLATIONS, DISCOVERED IN THE COURSE OF THE SECRETARY'S INVESTIGATION OF A UNION MEMBER'S COMPLAINT, MAY BE RAISED IN THE SECRETARY'S ACTION

While we have suggested that the question of judicial power to remedy the additional violations challenged by the Secretary in his suit in No. 58 may be decided on the ground that they were within the scope of the internal complaint, an alternative ground of decision suggests itself—one that we believe superior from the standpoint of statutory policy and sound administration. We deem it neither appropriate nor necessary to the scheme of Title IV that the Secretary be precluded from invoking the aid of the courts to correct any violation that he discovers in the course of investigating a union member's complaint. Moreover, we think the trial of election cases should not be burdened with difficult collateral questions as to whether a particular violation may properly be considered comprehended within the allegations of the internal complaint. Here, an affirmative answer to the question is readily forthcoming, but in other cases it will be more difficult and we do not believe that

the terms or policies of Title IV requires the court to indulge that debate.

The language of the statute itself imposes no restrictions on the scope of the Secretary's suit. Indeed, it does not even explicitly require that the suit challenge the particular violation specified in the union member's internal complaint; the Secretary is empowered to bring suit if, after investigating the complaint, "he finds probable cause to believe that *a* violation of this subchapter has occurred." 29 U.S.C. 482(b) (emphasis added). This general language was not inadvertent. One of the bills considered by Congress provided that when a member complained to the Secretary of a violation of the Act, the Secretary was to investigate "such allegation," and bring an action only if he found "probable cause to believe that such allegation is true" (S. 1002, 86th Cong., 1st Sess., 105 Cong. Rec. 2067). The Conference Committee adopted the broader view, reflected in the Senate Report, that the Secretary was "to investigate the complaint and determine whether there is probable cause to believe that an election was not held in conformity with the requirements of the bill." (S. Rep. No. 187, 86th Cong., 1st Sess., p. 21.)

Congress provided a sixty-day period for the investigation of election complaints and gave the Secretary sweeping investigative powers. These powers are far more extensive than those which would have been available to an individual union member under the private enforcement scheme of the House bills (see *Wirtz* v. *Local 191, Teamsters,* 321 F. 2d 445 (C.A. 2); *Local 57, International Union of Operat-*

ing Engineers v. *Wirtz*, 346 F. 2d 552 (C.A. 1)), and would be unnecessary if the Secretary's responsibility were merely to verify the allegations of an individual member's protest. Congress could not have intended so to restrict the Secretary when it must have been anticipated that, by the use of his broad investigative powers, he would frequently discover other serious violations of the Act hidden from a complainant or overlooked by him. To confine his challenge of an election to those violations complained of by the union member would disable the Secretary from using the fruits of his investigation to remedy the violations disclosed thereby, and would tend to frustrate the congressional purpose of ensuring free and honest elections. For example, a member might complain that he was improperly denied the right to vote. The Secretary's investigation might disclose that, unknown to the protestant, the ballot box had been stuffed. Under the rationale of the district court's decision, the Secretary would be powerless to act on the latter violation. The decision would place a premium on the ability of the union officers to conceal violations from their members.

The facts in No. 58 well illustrate the incongruity of limiting the Secretary to the precise allegations of the complaining union member. The complainant, Dial, was apparently able to secure evidence that nine ineligible members had been permitted to vote in the run-off election of July 13, 1963. The Secretary, upon investigation, quickly ascertained that a vastly larger number of ineligible members had been permitted to vote in that run-off election, and, further, that the

cause of this disregard of the union's own constitution was the Secretary-Treasurer's practice of "carrying" some delinquent members by making it appear that they had met their dues obligations when in fact they had not. An examination of the records which disclosed the true status of respondent's members with respect to the payment of dues also disclosed that ineligible members had been permitted to be candidates, as well as to vote, and that the violations complained of had permeated the general election as well as the run-off. It is doubtful whether the complainant could have gained access to these records to support his election protest. It may be assumed that he was unaware of the ineligibility of the candidates who opposed him. Congress, having given the Secretary broad investigative authority, cannot have intended that he be hamstrung by the ignorance of the complaining union member, by the artlessness of his protest, or by the lack of evidence available to him in support of his objections.[27]

[27] The role of the Secretary may be compared to that of the General Counsel of the National Labor Relations Board in investigating unfair labor practice charges under the Taft-Hartley Act. While the Board's General Counsel (like the Secretary, under the Labor-Management Reporting and Disclosure Act) can issue a complaint only after receipt of a charge, he may on his own initiative include in his complaint unfair labor practices concerning events which have occurred after the original charge was filed with him. The Supreme Court discussed the role of the Board in unfair labor practice proceedings—in language equally applicable to the function of the Secretary of Labor under Title IV—in *Labor Board* v. *Fant Milling Co.*, 360 U.S. 301, 307–308:

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private

Finally, the practice of the Secretary in investigating fully the conduct of every election concerning which he receives a complaint, and in including in his suit allegations of all uncorrected violations that are substantial, is not opposed to the policy—which underlies the requirement that a union member protest the conduct of an election internally before filing a complaint with the Secretary—"to allow unions great latitude in resolving their own internal controversies * * * before resort to the courts." *Calhoon* v. *Harvey*, 379 U.S. 134, 140. For, it is also the Secretary's policy to notify the union in advance of filing suit of all violations disclosed by his investigation, so that the union may take voluntary corrective action. Thus, in No. 58, at the conclusion of the Secretary's investigation, both the respondent local union and the international were advised of his discovery of the mass ineligibility of voters and candidates in both phases of the election and of the underlying cause. When the international requested particulars, the

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lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. * * * The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was created not to adjudicate private controversies but to advance the public interest * * *.

Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights, which Congress has imposed upon it.

Secretary's attorneys met with attorneys representing the international and furnished them with detailed information concerning the Secretary's findings. Yet, the international refused to recognize or correct any violation in the general election of June 8, 1963. The union had notice of all the violations disclosed by the investigation and deliberately forewent an opportunity to take voluntary remedial action before suit was filed—no less than if the internal complaint had specifically challenged the additional violations.

In sum, to confine the Secretary's suit either to the precise violations alleged in the internal complaint or even to violations within the general scope of that complaint would unwarrantedly and unnecessarily impede the congressional goal of union democracy.

III. IN NO. 57, THE DISTRICT COURT ERRED IN NOT FINDING THAT THE 75-PERCENT ATTENDANCE REQUIREMENT "MAY HAVE AFFECTED" THE OUTCOME OF THE 1963 ELECTION

Section 402(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482(c), requires the court to void an election tainted by a violation of Section 401 which "may have affected the outcome." Congress deliberately chose this language to relieve the Secretary of the burden of showing that a violation actually did affect the result. S. 1555, the bill passed by the Senate, contained the "may have affected" language. 105 Cong. Rec. 16150. H.R. 8342, the bill passed by the House, as well as the Kennedy-Ervin bill as originally introduced in the

Senate (S. 505, 86th Cong., 1st Sess., 105 Cong. Rec. 892), required a showing that the violation "affected" the outcome. 105 Cong. Rec. 15887. Faced with a choice between these formulations, the Conference Committee adopted the "may have affected" language. Conf. Rep. No. 1147, 86th Cong., 1st Sess., pp. 33–35. Senator Goldwater explained (105 Cong. Rec. 19765):

> The Kennedy-Ervin bill (S. 505), as introduced, authorized the court to declare an election void only if the violation of section 401 actually affected the outcome of the election rather than may have affected such outcome. The difficulty of proving such an actuality would be so great as to render the professed remedy practically worthless. Minority members in committee secured an amendment correcting this glaring defect and the amendment is contained in the conference report.

It is hardly debatable that the 75-percent attendance requirement in No. 57 "may have affected" the outcome of the 1963 election. It rendered more than 97 percent of the membership ineligible to stand for union office, leaving only ten eligible members in a union of 500 members. Indeed, no candidates were even nominated for four of defendant's eight elective offices (recording secretary and three trustees), and four members who were themselves ineligible under the 75-percent attendance requirement were appointed to those positions in violation of the union constitution and bylaws and of Section 401(b) of the Act, 29 U.S.C. 481(b), which requires a union to "elect its officers."

So drastic a limitation of eligible candidates can-

not be assumed to have had no probable or possible effect on the outcome of the election. Here, as it happens, one candidate who was actually nominated—John L. Miller, who filed the complaint that triggered the Secretary's suit—was disqualified from running by reason of the challenged attendance requirement. And surely the Second Circuit ruled correctly in *Wirtz* v. *Local Unions 410, Etc.*, 366 F. 2d 438 (C.A. 2), that *any* exclusion of willing candidates from the ballot may affect the election's outcome. As the court explained (366 F. 2d at 443):

> The proviso was intended to free unions from the disruptive effect of a voided election unless there is a meaningful relation between a violation of the Act and results of a particular election. For example, if the Secretary's investigation revealed that 20 percent of the votes in an election had been tampered with, but that all officers had won by an 8–1 margin, the proviso should prevent upsetting the election. Compare *Wirtz* v. *Local 11, International Hod Carriers*, 211 F. Supp. 408 (W.D. Pa., 1962). But in the cases at bar, the alleged violations caused the exclusion of willing candidates from the ballots. In such circumstances, there can be no tangible evidence available of the effect of this exclusion on the election; whether the outcome would have been different depends upon whether the suppressed candidates were potent vote-getters, whether more union members would have voted had candidates not been suppressed, and so forth. Since any proof relating to effect on out-

> come must necessarily be speculative, we do not think Congress meant to place as stringent a burden on the Secretary as the district courts imposed here.

But we do not rest on that circumstance. Normally, it is impossible to establish whether additional candidates would have run even if the attendance requirement had not been in effect or whether those candidates would have lost if they had run. Such questions are hardly susceptible of proof; the statutory test of "may have affected" was designed to avoid such elusive and treacherous inquiries.

In sum, any mass disqualification of candidates, we suggest, satisfies the "may have affected" test and likewise any disqualification of avowed candidates. Under either standard, the district court here erred in finding that the unlawful attendance requirement was beyond its remedial powers under Title IV.

CONCLUSION

The judgments of the court of appeals should be reversed and the cases remanded to the appropriate district court. In No. 57, the district court should be instructed to enter an order directing a supervised election as requested by the Secretary. In No. 58, the district court should be instructed to decide whether the additional allegations of the Secretary have merit and, if so, to order the supervised election requested by the Secretary in that case.

Respectfully submitted.

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